IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOHN C. SHELHORSE, IV	)	**Supreme Court #SC93895**
	)	
Respondent.	)	

INFORMANT'S BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Background and Disciplinary History

Respondent is John C. Shelhorse, IV who was licensed as an attorney in Missouri on September 29, 1995. **App. 23.**[1] Respondent is 52 years old. Respondent has been the subject of prior discipline having been reprimanded in 2004. **Id.**

Respondent maintains two banking accounts with Bank of America, N. A. ("BofA"). **Id.** One account is Respondent's trust account (the "Trust Account") and the other is Respondent's operating account (the "Operating Account"). **Id.**

On or about November 28, 2011, Informant received notice from BofA that the Trust Account was overdrawn. **Id.** During Informant's investigative process and in response to Informant's request for banking records, Respondent delivered records for the (a) Trust Account covering the period from July 26, 2011 through March 1, 2012 (the "Trust Account Records") and (b) Operating Account covering the period April 18, 2011 through April 16, 2012 (the "Operating Account Records"). **Id.**

Upon Informant's review of the Trust Account Records and the Operating Account Records, it was evident that Respondent (a) utilized the Trust Account twice to pay Respondent's personal expenses, (b) deposited advance fees into the Operating

[1] The facts contained herein are drawn from the Joint Stipulation of Facts and Conclusions of Law entered into between Respondent and Informant. Citations to the record are denoted by the appropriate Appendix page reference followed by the specific transcript page reference in parentheses, for example **"App. ___"**.

Account, (c) paid client and made third party disbursements from the Operating Account, and (d) did not keep adequate records of the Trust Account or the Operating Account. **Id**. The Trust Account Records demonstrated that Respondent paid personal expenses from the Trust Account on two occasions. **Id**. One where he made a payment to Sam's Club and the other where he made a payment to Shell Oil. **Id**. In addition, Respondent made withdrawals from the Trust Account using a debit card and also deposited personal funds into the Trust Account which included earned fees. **Id**. The Operating Account Records demonstrate that Respondent deposited client funds into his Operating Account in advance of such funds being earned by Respondent in connection with his practice of charging a flat fee for certain aspects of his criminal law practice. **Id**.

Informant made an initial request for Trust Account Records and Operating Account Records on or about December 14, 2011 and between that date and March 21, 2012, Informant made written requests to Respondent for additional Trust Account Records and Operating Account Records. **Id**. Respondent failed to provide the additional records within the requested time period. **Id**. As a result, Informant had to subpoena BofA for the additional Trust Account Records and the Operating Account Records. **Id**.

Disciplinary Proceeding

Following Informant's completion of its investigation of the matters concerning the Trust Account and the Operating Account, Informant found probable cause to issue an Information against Respondent. Informant served the Information on Respondent on

or about July 18, 2013. Respondent's Answer to the Information was received on or about August 27, 2013. **App. 18.** The Chair of the Missouri Supreme Court Advisory Committee appointed a Disciplinary Hearing Panel (the "Panel") in this case on September 1, 2013. **App. 20.**

Informant and Respondent entered into a Joint Stipulation of Facts and Conclusions of Law dated as of November 14, 2013 (the "Joint Stipulation"). **App. 23.** The Panel conducted a hearing on the Joint Stipulation on November 18, 2013 and adopted the Joint Stipulation as its decision on November 27, 2013 (the "DHP Decision"). **App. 70.**

As a result of adopting the Joint Stipulation as its decision, the Panel concluded that Respondent:

a. commingled his funds with the funds in the Trust Account in violation of Rule 4-1.15(a);

b. deposited client funds into the Operating Account in advance of those fees being earned in violation of Rule 4-1.15(a);

c. used the Trust Account to pay personal expenses which resulted in the Trust Account being overdrawn; and

d. violated Rule 4-8.1(c) by failing to fully cooperate with Informant in the investigation.

The Panel found the following as aggravating factors:

a. misuse of the Trust Account; and

b. initial failure to cooperate with the investigative process.

The Panel found the following as mitigating factors:

a. lack of any recent disciplinary history;

b. remorse; and

c. subsequent cooperation with the Office of Chief Disciplinary Counsel.

Based on the foregoing findings and conclusions as a result of adopting the Joint Stipulation as the DHP Decision, the Panel recommended that Respondent receive an indefinite suspension, with leave to apply for reinstatement in six months, with the suspension being stayed, together with probation for one year.

Informant accepted the DHP Decision by letter dated December 3, 2013. **App. 82.** Respondent accepted the DHP Decision by letter dated December 10, 2013. **App. 83.** By order dated February 4, 2014 this Court ordered Informant and Respondent to file briefs in this matter. The Court specifically ordered the parties to brief "the factual and legal issues regarding the charging of flat fees in criminal cases." **App. 84.** Informant filed the record in this matter with the Court on March 6, 2014.

POINTS RELIED ON

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) COMMINGLING HIS FUNDS WITH THE FUNDS IN THE TRUST ACCOUNT IN VIOLATION OF RULE 4-1.15(a);

(B) UTILIZING FLAT FEE AGREEMENTS IN WHICH HE DEPOSITED ADVANCE FEE PAYMENTS FROM CLIENTS INTO HIS OPERATING ACCOUNT BEFORE THE FEES WERE EARNED IN VIOLATION OF RULE 4-1.15(a);

(C) USING THE TRUST ACCOUNT TO PAY PERSONAL EXPENSES WHICH RESULTED IN THE TRUST ACCOUNT BEING OVERDRAWN; AND

(D) VIOLATING RULE 4-8.1(c) BY FAILING TO FULLY COOPERATE WITH INFORMANT IN THE INVESTIGATION.

Rule 4-1.15

Rule 4-1.16

Rule 4-8.1

Advisory Committee Formal Opinion 128

POINTS RELIED ON

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS, WITH THE SUSPENSION STAYED AND IN LIEU OF ENFORCEMENT THEREOF, PLACE RESPONDENT ON PROBATION FOR ONE YEAR FROM THE EFFECTIVE DATE OF ANY DISCIPLINARY ORDER ISSUED BY THIS COURT IMPOSING DISCIPLINE.

A.B.A. *Standards for Imposing Lawyer Sanctions* (1991 ed.)

ARGUMENT

I.

RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT BY:

(A) COMMINGLING HIS FUNDS WITH THE FUNDS IN THE TRUST ACCOUNT IN VIOLATION OF RULE 4-1.15(a);

(B) UTILIZING FLAT FEE AGREEMENTS IN WHICH HE DEPOSITED ADVANCE FEE PAYMENTS FROM CLIENTS INTO HIS OPERATING ACCOUNT BEFORE THE FEES WERE EARNED IN VIOLATION OF RULE 4-1.15(a);

(C) USING THE TRUST ACCOUNT TO PAY PERSONAL EXPENSES WHICH RESULTED IN THE TRUST ACCOUNT BEING OVERDRAWN; AND

(D) VIOLATING RULE 4-8.1(c) BY FAILING TO FULLY COOPERATE WITH INFORMANT IN THE INVESTIGATION.

Standard of Review of Disciplinary Hearing Panel Decision

It is well settled that a Disciplinary Hearing Panel's recommendations are advisory in nature. *In re Crews*, 159 S.W.3d 355, 358 (Mo. Banc 2005). In a disciplinary proceeding, this Court reviews the evidence *de novo*, independently determining all

issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *Id*. Discipline will not be imposed unless professional misconduct is proven by a preponderance of the evidence. *Id*. Where misconduct is proven by a preponderance of the evidence, violation of the Rules of Professional Conduct by an attorney is grounds for discipline. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. Banc 2004).

A. Respondent's commingling of his funds with the funds in the Trust Account violated Rule 4-1.15(a).

Informant's audit of the Trust Account Records revealed that Respondent deposited personal funds into the Trust Account, including earned fees. **App. 67-69.** In addition, the audit revealed that Respondent paid personal expenses from the Trust Account on two occasions by making a payment to Sam's Club and one to Shell Oil on November 10, 2011 and November 14, 2011, respectively. **Id**.

Based upon the foregoing, Respondent violated Rule 4-1.15(a) by commingling his funds with the funds in the Trust Account.

B. Respondent utilized flat fee agreements in which he deposited advance fee payments from clients into his operating account before the fees were earned in violation of Rule 4-1.15(a).

Informant's review of Respondent's operating account records revealed that Respondent deposited client funds into his operating account in advance of such funds being earned in connection with his practice of charging clients a flat fee in criminal defense cases and depositing those funds into the operating account immediately upon

receipt. **App. 67-69.** To address this issue, the Court's Order dated February 4, 2014 directed the parties to brief "the factual and legal issues regarding the charging of flat fees in criminal cases".

Types of Fees and their Characteristics

A survey of other states' case law and ethics opinions establishes that while there are numerous opinions on the ethical requirements relative to the different types of legal fees that are charged and collected by lawyers at the commencement of a client representation, the information in these opinions is not gathered in a single place and the opinions appear to provide contradictory or inconsistent advice. In addition, the confusion among lawyers as to the ethical requirements for legal fees paid prior to representation has led to poorly crafted fee agreements. In this regard, a brief discussion of the various types of fee agreements recognized among the states and their respective characteristics is in order.

General Retainer. Under this type of arrangement, the client pays consideration at the beginning of a representation to reserve the exclusive services of a lawyer. Such retainers are sometimes referred to as "true retainers" because the funds are paid for nothing more than the reservation of the lawyer's time; the legal services ultimately provided by the lawyer are separately compensated.

Advance Fee Payment. In this arrangement, a deposit of money by the client will be billed against legal services as such services are provided, usually on an hourly basis. The advance fee payment is not earned until legal services are provided, must be

deposited into the client trust account and any unearned portion of the payment must be refunded upon the termination of the attorney-client relationship.

Flat Fee. A flat fee includes any arrangement in which the lawyer's charge for specified services is a fixed dollar amount, regardless of when the lawyer is paid, how much work the lawyer must perform in order to carry out the objective of the representation and what name is applied by the lawyer to the agreement (e.g., "flat fee", "minimum fee", "nonrefundable retainer", etc.).

Key Ethical Considerations

Regardless of the type of fee, all legal fees must meet the following standard set forth in Rule 4-1.5(a) of the Rules of Professional Conduct:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (3) the fee customarily charged in the locality for similar legal services;
> >
> > (4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

It may be difficult to determine whether a legal fee is unreasonable until the representation and all of the relevant factors are taken into consideration. At that point, a lawyer may be required to disgorge some portion of a fee that he or she has already collected to insure that the total fee is not unreasonable.

In addition to the requirements of Rule 4-1.5, prohibiting unreasonable fees, a separate rule, Rule 4-1.15(a), requires that a lawyer deposit any funds that belong to a client in the lawyer's trust account. This means that any funds that remain the property of the client until earned, usually by the performance of legal services, must be deposited into the lawyer's trust account and may not be withdrawn until earned. When the lawyer is discharged, any advance fee payment that is unearned and that remains on deposit in the trust account must be paid back to the client. Rule 4-1.16(d).

Finally, a lawyer must deal honestly with his or her clients and should provide a client with sufficient information with which to make an informed decision about the representation, including decisions about the fee arrangement. Rules 4-1.4 and 4-8.4(c).

The Treatment of Flat Fees and Nonrefundable Retainers in Missouri

In 1973, the Court considered a discipline case in which the attorney accepted a $1,000 retainer fee from a minor's father to represent the minor on criminal charges. *In re Sullivan*, 494 S.W.2d 329 (Mo. banc 1973). The criminal charges were almost immediately dismissed under circumstances where the lawyer knew or reasonably should have known that his representation of the minor had nothing to do with the dismissal of the charges. The lawyer failed to notify the client of the dismissal, failed to provide a requested accounting of services rendered (he had performed six hours of work) and failed to refund any portion of the $1,000 fee. The Court found that the lawyer's lack of communication reflected knowledge that the fee was grossly excessive and that the client would have demanded a refund of a substantial portion of the fee paid.[2] The Court reprimanded the lawyer. *See also*: *In re Forge*, 747 S.W.2d 141, 144 (Mo. banc 1988) (advance fee sought from client in payment of attorney's fees on appeal must be placed in trust account).

For many years prior to May 2010, flat fees were considered earned upon receipt in Missouri. Accordingly, they could ethically be deposited into the attorney's operating account rather than into the attorney's trust account. *See Informal Opinion 2006-0030,*

[2] The Court noted that it did not need to decide the technical meaning of the word "retainer" as used in this case, finding "[o]ur research has disclosed that that apparently simple word has many different meanings, depending entirely upon the particular agreement in each case." *Id*. at 334.

issued by Legal Ethics Counsel in 2006 per Rule 5.30.[3] Though the flat fee was deemed earned upon receipt, and therefore not required to be deposited into the trust account, it remained subject to a retrospective review for reasonableness and a refund of any portion deemed unreasonable under Rule 4-1.5.

In *Formal Opinion 128*, issued on May 18, 2010, the Supreme Court Advisory Committee addressed issues regarding nonrefundable fees and flat fees. The Advisory Committee clarified that there is no such thing as a flat fee that is "earned upon receipt" under Missouri's Rule of Professional Conduct. Instead, the opinion advises, all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned, similar to the prompt removal of earned hourly fees when advance payments are made.

The Advisory Committee noted that lawyers often receive advance fee payment before they complete any work legal work and describe all or part of these payments as either a "minimum" or "nonrefundable" fee. The Committee found these characterizations misleading because Missouri does not recognize nonrefundable fees "earned upon receipt." In this regard, the Committee observed that Rule 4-1.16(d) mandates that any fee that has not been earned must be refunded at the end of the representation. A lawyer may retain a so-called flat fee if the total amount charged was reasonable, but the lawyer must return any portion of that fee that was not earned. The

[3] *Informal Opinion 2006-0030* was withdrawn in 2010 because it conflicted with *Formal Opinion 128* issued by the Supreme Court Advisory Committee.

Committee explained that the factors listed in Rule 4-1.5(a) for determining the reasonableness of a fee must be analyzed to determine whether the attorney must refund all or a portion of the fees paid in advance.

According to the Advisory Committee, part of the confusion over nonrefundable fees stems from the historical view in Missouri that a flat fee was "earned upon receipt" for trust account purposes. The Committee disagreed, noting that the concept of "earned upon receipt" is directly at odds with Rule 4-1.15(f), which states "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."[4]

The Advisory Committee specifically rejected flat fees and nonrefundable fees in the context of criminal cases. The Committee noted that representation in a criminal case may terminate early because the attorney withdraws, the client discharges the attorney or the prosecution dismisses the charges. In any of these circumstances, the Committee explained, the attorney may owe a refund. The amount of the refund should be based on the reasonable value of the legal services actually provided, taking into account all of the factors listed in Rule 4-1.5(a).

Formal Opinion 128 notes that in some cases it may be appropriate for a lawyer to charge a reasonable "intake fee" to compensate the lawyer for the loss of potential business triggered if the lawyer receives enough information at a preliminary interview

[4] This provision of the safekeeping property rule was moved to Rule 4-1.15(c) as part of the amendment to the trust accounting rules that became effective on July 1, 2013.

with a prospective client to create a conflict of interest under Rule 4-1.18 or Rule 4-1.9. In other words, an attorney may charge a fee for initially consulting with a prospective client or accepting a case, to the extent that it creates a conflict in a situation in which the attorney may have to decline representation of others involved in the case. The Advisory Committee noted that such a fee would be "earned upon commencement" and not accurately characterized as nonrefundable.

The Treatment of Flat Fees and Nonrefundable Retainers in Other States

Courts, discipline agencies and bar ethics committees across the country have grappled with issues relating to flat fees and nonrefundable retainers. Because the terms have no fixed meaning or usage, the decisions from other states are difficult to analyze and harmonize. For example, the term "retainer" is often intended to mean "general" retainer or engagement fee, which in its strict sense is for availability of the lawyer and not for legal work. Other times, the term is intended to apply to fees for specific services to be performed and the claim is made that the funds belong to the lawyer upon contracting and will not be returned under any circumstances. However, it appears to be the case in every jurisdiction that, regardless of the terminology used, fees are subject to scrutiny for reasonableness (as required by Missouri's Rule 4-1.5), that lawyers are required to refund unearned fees (as required by Missouri's Rule 4-1.16), and that funds belonging to clients must be segregated in the lawyer's trust account (as required by Missouri's Rule 4-1.15). Decisions from the following states are illustrative:

Alabama. In *Alabama Ethics Op. 2008-03*, the Alabama State Bar opined that a flat fee paid prior to the conclusion of a representation must be deposited in a lawyer's trust account and may only be withdrawn incrementally as such fees are earned.

Alaska. In *Opinion 2012-2*, 2012 WL 1849657 (April 30, 2012), the Alaska Bar Association Ethics Committee determined that lawyers and clients can in some instances enter into flat-fee or fixed-fee agreements in which payments made before legal services are rendered are immediately treated as attorney property rather than held in trust for the client. While noting that ethics rules generally require unearned advance fee payments to be deposited in client trust accounts, the Committee pointed out that in some circumstances, a rule requiring prepaid fees to be placed in a client trust account would be contrary to the client's economic interests. For example, advance fee payments in which unearned flat fees become the lawyer's property immediately are permissible, according to the Committee, in a case where the client is trying to fund legal resistance to creditors and to keep creditors from attaching the funds. The Committee cautioned, however, that such an agreement must serve the client's economic interests and can only be presented to the client after a thorough consultation and clear understanding on the client's part as to the potential benefits and drawbacks of such an arrangement.

In a related 2009 ethics opinion, the Alaska Ethics Committee concluded that every fee, regardless of how it is characterized, must be reasonable and subject to the standards of the Rules of Professional Conduct. For that reason, the Committee concluded that it is misleading to describe a fee or retainer as nonrefundable in any way. The attorney must refund the non-earned portion of a fee if the attorney withdraws from

representation of the client or if, at the cessation of the representation, the fee would be excessive under the circumstances of the particular matter. *Opinion 2009-1*, 2009 WL 1570207 (May 5, 2009).

Arizona. The Ethics Committee of the Arizona Bar has determined that a lawyer may charge clients a "nonrefundable" minimum fee to complete a task or to work a specified number of hours on the matter, whichever comes first. In addition, if counsel does not complete the task within the specified hours, the agreement may further provide that the billing structure will switch to an hourly rate for the remainder of the representation, so long as the client understands the arrangement and the overall fee remains reasonable. Because the arrangement only guarantees a maximum number of hours and does not certify that counsel will see the task through to conclusion, the Committee recommended that lawyers avoid using the term "flat fee", which connotes that the lawyer will complete the representation regardless of the number of hours required. *Arizona Ethics Op. 10-03*, dated July 7, 2010.

Connecticut. The Connecticut Bar Association Committee on Professional Ethics addressed the issue of flat fees and nonrefundable retainers in its *Informal Opinion 00-12*, 2000 WL 1370793 (June 19, 2000). The Committee characterized the concept of nonrefundable fees as "slippery as a watermelon seed", noting:

> "Our deliberations have determined that it is not uncommon for lawyers who practice in certain areas of the law (such as criminal law) to be paid a fixed lump sum fee prior to the commencement of representation. The fee is for a particular service, such as appearance at a hearing or a trial, or defense of the accused until

> the matter is disposed of, or until completion of the trial level, etc. and the fee does not depend upon the amount of time or effort which the attorney expends during the representation. For example, an attorney can accept a lump sum fee for representation in a criminal matter, and then convince the prosecutor to dismiss the action in one conference or court appearance. Successful results make the fee reasonable, regardless of the amount of time spent to achieve the results. Even if the result is not particularly successful, if the services agreed upon have been performed, and the fee is reasonable, the lawyer will not be required to refund any of the fee to the client. We see no basis upon which to criticize that practice. In fact, the practice serves the laudatory purpose of providing legal services to those who need them. The reasonableness of the fee may be determined upon time, or upon the other factors described in Rule 1.5. However, if the client pays a lump sum fee before the engagement, and, through no fault of the client, the lawyer does not perform as agreed, that is, does not see the prosecutor, does not go to court, does not participate in the trial, and in one of those ways does not fulfill the obligations of the engagement, then designation of the fee as "nonrefundable" cannot protect the attorney from a requirement to refund all or a portion of the unearned fee."

District of Columbia. In *In re Mance*, 980 A.2d 1196 (D.C. App. 2009), the disciplinary authority sought discipline against a lawyer who charged a $15,000 flat fee in a criminal matter. Attorney Mance took the initial $7,500 installment payment and placed a portion of it in his operating account. The client later fired Mance as his

attorney and demanded a return of the entire $7,500 payment. Mance was unable to refund the fee because he did not have the funds readily available.

The District of Columbia Court of Appeals held that the flat fee payment was an advance for legal services that were not yet performed and, as such, must be placed in the attorney's trust account until earned unless the client agrees otherwise. Noting that advance payments must be refunded to the extent that they are unearned, the court explained that it would make no sense to allow lawyers to structure a fee agreement that provides that an advance payment is earned before any benefit has been conferred. Significantly, the court also found that an unearned flat fee may be treated as the attorney's property if the client gives informed consent to such an arrangement. Because it found the law on this issue somewhat murky, the court held that it would apply its ruling on a prospective basis only. It rejected bar counsel's request for a suspension of the lawyer, concluding that a public censure for commingling was appropriate under the circumstances.

Indiana. The Indiana Supreme Court reprimanded an attorney for charging a nonrefundable flat fee in two family law cases. The Court held that lawyers may charge flat fees, but that they must place the funds into a trust account and make withdrawals as the fees are earned. In addition, the Court held that all unearned fees must be refunded at the end of the representation. The Court observed that any fee contract that unduly impairs a client's right to fire the lawyer is invalid and violates the rules requiring that fees be reasonable and that unearned fees be refunded. *In re O'Farrell*, 942 N.E.2d 799 (Ind. 2011), c*iting Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind. 1999).

Kansas. In *State v. Cheatham*, 292 P.3d 318 (Kansas 2013), the Kansas Supreme Court held that a defense lawyer's flat fee arrangement in a capital murder case created a conflict of interest that deprived the client of his constitutional right to effective assistance of counsel and required that a new trial be held. Defense counsel was a solo practitioner with a high-volume rural law practice. The lawyer had never previously defended a capital case and had not tried a murder case in over twenty years. The lawyer took the capital case knowing that the client was indigent, but nevertheless charged the client a $50,000 flat fee. According to the court, the flat fee arrangement created an actual conflict of interest that adversely affected the adequacy of the representation because it gave the lawyer a powerful incentive not to devote the time demanded by a death penalty case. The Court further held that the conflict so clearly had an adverse impact on the client's case that it was not necessary for the client to prove actual prejudice in order to receive a new trial.

Maine. The Professional Ethics Commission of the Board of Overseers of the Maine Bar determined that a lawyer may not use a flat fee agreement that describes the fee as nonrefundable. The agreement may, however, describe the flat fee as the lawyer's property subject to refund if the legal services are not provided. *Maine Ethics Op. 206* (December 12, 2012).

New Mexico. The New Mexico Supreme Court has held that a lawyer who deposited a client's flat fee into his operating account and began using the funds for personal expenses before the fee was earned was culpable for commingling and misusing client funds, but not for misappropriation absent evidence that the attorney had a

wrongful motive. *In re Yalkut*, 176 P.3d 1119 (N.M. 2008). In suspending the attorney for one year, the Court took the opportunity to emphasize that nonrefundable fees are unreasonable and that a flat fee for future legal services cannot be considered as earned when paid and must be held in trust until earned.

New York. The New York State Bar Association Committee on Professional Ethics has determined that a lawyer may agree with a client to treat an advance fee payment as the lawyer's own property to be deposited into the lawyer's operating account, provided that the lawyer agrees to refund to the client any advance fee that is not earned during the representation. *N.Y. Ethics Opinion 816*, 2007 WL 5025460 (October 26, 2007). The Committee noted that such an arrangement can benefit the client, who may desire to hire counsel to defend the client from judgment creditors. The Committee confirmed, however, that such fee arrangements must be fair, reasonable, and fully known and understood by the client.

North Carolina. In 2008, the North Carolina State Bar had occasion to analyze the various types of legal fees that are charged and collected by lawyers at the beginning of a client representation. *N.C. Formal Ethics Opinion 10*, 2008 WL 5021158 (October 24, 2008). The Bar stated that a flat fee may be earned at the beginning of the representation and is payment for specified legal services to be completed within a reasonable period of time, noting that a flat fee provides economic value to the client and the lawyer alike because it enables the client to know, in advance, the expense of the representation and it rewards the lawyer for efficiently handling the matter. The Bar found that flat fee arrangements are customarily identified with isolated transactions, such as traffic

citations, criminal charges and domestic actions. The flat fee is treated as money to which the lawyer is immediately entitled and may be deposited into the lawyer's general operating account. The Bar cautioned, however, that no fee arrangement can ever be characterized as "nonrefundable" and that the lawyer must refund any portion of the fee determined to be unearned and unreasonable in the event that the attorney-client relationship terminates prior to the conclusion of the representation.

North Dakota. In *In re Hoffman*, 834 N.W.2d 636 (N.D. 2013), the client retained Hoffman to defend him against four counts of gross sexual imposition. The written fee agreement provided for a $30,000 nonrefundable, minimum fee to defend the case to a conclusion. The client also agreed in the agreement that the fee immediately became the lawyer's property upon payment and that it would not be held in trust. The North Dakota Supreme Court held that a nonrefundable minimum fee agreement is not *per se* unreasonable under Rules 1.5 or 1.15, but remains subject to the refund requirement of Rule 1.16 when a portion of the payment is not earned before the lawyer's services are terminated by the client. The Court held that Hoffman violated Rule 1.16 and ordered that all unearned fees be refunded as the appropriate sanction, but did not reprimand the attorney as the hearing panel had recommended. In addition, the Court held that the lawyer nonrefundable minimum fee arrangement at issue did not violate Rule 1.5 because North Dakota, unlike other jurisdictions, had not adopted a rule barring the use of nonrefundable fee agreements as against public policy and per se unreasonable. Finally, the Court noted that North Dakota has refrained from holding that advance fees cannot be

treated as the lawyer's property upon payment provided that the contract expressly states that they will not be held in trust.

Ohio. The Ohio Supreme Court determined that a six month stayed suspension was the appropriate sanction for a lawyer who violated Rule 1.16 by charging his client a nonrefundable flat fee to represent her in a foreclosure proceeding. *Cuyahoga County Bar Association v. Cook*, 901 N.E.2d 225 (Ohio 2009). The attorney argued that he was entitled to keep the fee immediately upon payment because the funds were earned upon receipt. The Court rejected that argument and noted that it had consistently disapproved of nonrefundable retainers absent a clear indication from the agreement that the money was a true retainer designed to secure the lawyer's exclusive services and requiring the lawyer to forego employment by a competitor of the client. The Court relied heavily upon the principle codified in Rule 1.16 that all fees paid in advance are subject to refund if the lawyer does not earn the fee.

Oregon. The Oregon State Bar Association issued a formal ethics opinion in 2005 finding that if there is a clear written agreement between the lawyer and a client that flat fees paid in advance are earned upon receipt, such funds belong to the lawyer and may not be placed in the lawyer's trust account. If no such agreement exists, then the funds must be considered client property and afforded the protections of Rule 1.15 (i.e., deposited into the lawyer's trust account). In either event, nonrefundable fees are prohibited and a lawyer who does not complete all contemplated work will be unable to retain the full flat fee. *Formal Opinion 2005-151*, 2005 WL 5679576 (August 2005).

Texas. The Texas Bar has determined that lawyers may collect "nonrefundable" fees and deposit them into the lawyer's operating account rather than into a trust account, but only if the total amount of the fee is reasonable and the fee is paid solely to guarantee the lawyer's future availability to the client.[5] In contrast, the Committee made clear that fixed or flat fees that are collected in advance to perform contemplated legal services are not earned until the lawyer actually completes the designated task. This latter type of fee is not "nonrefundable" and must be placed in the lawyer's trust account. *Texas Ethics Opinion 611* (Tex. Prof. Eth. Comm.) 2011 WL 5831792 (September 2011).

Washington. The Washington Bar has opined that a lawyer who agrees to represent a client for a flat fee must deposit the client's prepayment of filing expenses into the lawyer's trust account. If the payment is received in a single check that also includes the lawyer's flat fee, the lawyer must deposit the entire amount into the trust account and should immediately withdraw the portion representing the lawyer's fee when the check clears. *Washington State Bar, Ethics Opinion 2222* (2012).

Analysis

[5] This arrangement amounts to a general retainer wherein the client pays consideration at the beginning of a representation to reserve the exclusive services of a lawyer. Such retainers are sometimes referred to as "true retainers" because the funds are paid for nothing more than the reservation of the lawyer's time; the legal services ultimately provided by the lawyer are separately compensated.

Advisory Committee *Formal Opinion 128* concluded that a flat fee that is not "earned upon receipt" under Missouri's Rules of Professional Conduct. Instead, the Committee advised that all flat fees must be deposited into the lawyer's trust account and promptly removed once actually earned. Informant supports the Advisory Committee's analysis and conclusions regarding flat fees as contained in *Formal Opinion 128*.

As discussed above, it is clear that all legal fees, regardless of the type, must meet certain ethical standards, including the following:

- The fee must be reasonable pursuant to the factors listed in Rule 4-1.5(a);
- The lawyer must deposit any funds that belong to the client into the lawyer's trust account pursuant to Rule 4-1.15(a). This means that any payment that remains the property of the client until earned, usually by the performance of legal services, must be deposited into the lawyer's trust account and may not be withdrawn until earned.
- When the lawyer is discharged or when the attorney-client relationship ends prior to the completion of the representation, any advance fee payment that was unearned and that remains on deposit in the lawyer's trust account must be refunded to the client per Rule 4-1.16(d).
- A lawyer must deal honestly with his or her client and should provide the client with sufficient information with which to make an informed decision regarding the representation and the fee arrangement, per Rules 4-1.4 and 4-8.4(c).

At the outset, regardless of how *Formal Opinion 128* or this Court interpret flat fees, it is indisputable that a lawyer cannot characterize a flat fee (or any fee) as

nonrefundable. An advance fee payment is at least partially refundable if the client terminates the representation before the lawyer has performed sufficient services to merit his or her collecting the entire amount of the advance. Rule 4-1.16(d) specifies that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonable practicable to protect the client's interests, such as … refunding any advance payment of fees or expenses that has not been earned or incurred."

Prior to the adoption of *Formal Opinion 128*, Missouri considered flat fees as "earned upon receipt" and permitted lawyers to ethically deposit such fees into the lawyer's operating account. While such an interpretation may have, in a practical sense, been consistent with the manner in which many attorneys entered into fee arrangements with their clients, it was a legal and ethical fiction. By way of example, were a client to pay the lawyer a flat fee in a criminal case and thereafter terminate the relationship before the lawyer had performed any work on the matter, then the lawyer would have to analyze the factors set out in Rule 4-1.5(a) to determine the extent to which he or she would have to refund all or a portion of the flat fee paid in advance. To the extent that the lawyer reasonably concluded that he or she owed the client a refund of all or any portion of the flat fee paid, then it would have violated Rule 4-1.15(a) not to have deposited such funds into the lawyer's trust account since they remained the property of the client.

The lawyer in the above example may have earned a portion of the flat fee by initially interviewing the prospective client or by accepting the representation, because once the lawyer has received enough information it creates a conflict of interest under Rules 4-1.18 and 4-1.9. Once the lawyer obtained information that could be adverse to

the prospective client, neither the lawyer nor any other member of the lawyer's firm may accept representation of the opposing party or any other party with adverse interests. Accordingly, provided it is apparent to the client, a lawyer may reasonably charge a fee for initially consulting with a prospective client or accepting the case pursuant to Rule 4-1.5(a)(2). If the representation terminates at that point, the fee retained by the lawyer pursuant to Rule 4-1.5(a)(2) has been earned so long as the amount retained is reasonable. However, any portion of the flat fee in excess of this "consultation" fee remains the property of the client and must be deposited into the lawyer's trust account.

As discussed above, some states permit lawyers, with the client's informed consent, to characterize flat fees as "earned upon receipt" and to deposit the entirety of such fees into the lawyer's operating account. Even those states, however, require the lawyer to perform a Rule 4-1.5 analysis in the event that the attorney-client relationship is terminated prior to the conclusion of the representation and to refund any unearned and therefore unreasonable portion of the flat fee to the client. This creates an obvious ethical dilemma since the unearned portion of the flat fee should have been deposited into the trust account pursuant to Rule 4-1.15(a). In addition, if the lawyer has already spent the flat fee out of the operating account, then he or she is not refunding money to the client using the client's own funds.

Based upon the foregoing, Informant believes that *Formal Opinion 128* correctly analyzes the treatment of flat fees in criminal cases. Such fees should ethically be placed into the lawyer's trust account, less any reasonable sum determined to have been earned due to the fact that the lawyer cannot accept another adverse representation, and should

be withdrawn as the lawyer earns said fees. Respondent violated Rule 4-1.15(a) by utilizing flat fee agreements and by depositing his clients' advance fee payments into his operating account.

C. Respondent used the Trust Account to pay personal expenses which resulted in the Trust Account being overdrawn.

Informant's audit of the Trust Account Records revealed that Respondent paid personal expenses from the Trust Account on two occasions. **App. 67-69** One where he made a payment to Sam's Club and the other where he made a payment to Shell Oil. **Id.** In addition, Respondent made withdrawals from the Trust Account using a debit card and also deposited personal funds into the Trust Account, including earned fees. **Id.**

Based upon the foregoing, Respondent used the Trust Account to pay personal expenses which resulted in the Trust Account being overdrawn.

D. Respondent violated Rule 4-8.1(c) by failing to fully cooperate with Informant in the investigation.

Informant made an initial request of Respondent for the Trust Account Records and Operating Account Records on or about December 14, 2011 and between that date and March 21, 2012, Informant made written requests to Respondent for additional Trust Account Records and Operating Account Records. **App. 5.** Respondent failed to provide the additional records within the requested time period. **Id.** As a result, Informant had to subpoena BofA for the additional Trust Account Records and the Operating Account Records. **Id.**

Based upon the foregoing, Respondent violated Rule 4-8.1(c) by failing to fully cooperate with Informant in the investigation.

II.

THIS COURT SHOULD SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR AT LEAST SIX MONTHS, WITH THE SUSPENSION STAYED AND IN LIEU OF ENFORCEMENT THEREOF, PLACE RESPONDENT ON PROBATION FOR ONE YEAR FROM THE EFFECTIVE DATE OF ANY DISCIPLINARY ORDER ISSUED BY THIS COURT IMPOSING DISCIPLINE.

This Court has relied on the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards") to determine the appropriate discipline to be imposed in attorney discipline cases. *See, e.g.*, *In re Crews*, 159 S.W.3d 355, 360-61 (Mo. banc 2005); *In re Warren*, 888 S.W.2d 334 (Mo. banc 1994); *In re Griffey*, 873 S.W.2d 600 (Mo. banc 1994); *In re Oberhellman*, 873 S.W.2d 851 (Mo. banc 1994). Therefore, the suspension guidelines included within the ABA Standards are instructive. Based upon an analysis of the ABA Standards and Missouri case law, an indefinite suspension with leave to apply for reinstatement after six months, with the suspension stayed, is the appropriate sanction in this case. The analysis of the ABA Standards and Missouri case law further supports that in lieu of enforcement of the suspension, Respondent should be placed on probation for one year from the effective date of any disciplinary order issued by this Court imposing discipline.

According to the ABA Standards, suspension is appropriate in various circumstances, including, (a) in matters involving the failure to preserve client's property,

when a lawyer knows or should have known that he or she is dealing improperly with client property and causes injury or potential injury to a client (Section 4.12 of the ABA Standards), and (b) when a lawyer engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public or the legal system (Section 7.2 of the ABA Standards). Respondent's misuse of his Trust Account and initial failure to cooperate with the Informant's investigation evidence conduct prejudicial to the administration of justice and caused or had the potential to cause injury to his clients and the legal profession. Therefore, suspension is the appropriate sanction.

Imposition of this sanction is also consistent with Missouri case law. It is appropriate that the suspension be stayed when viewing the facts stipulated herein in light of *In re Wiles*, 107 S.W.3d 228 (Mo. banc 2003). In *Wiles*, the Respondent received an indefinite suspension with leave to apply for reinstatement after six months; the suspension was stayed and the Respondent placed on one year of probation. *Wiles* was a reciprocal discipline case from Kansas. The respondent's Kansas discipline had been for violations relating to diligence, communication, fees, safekeeping property and competence. *In re Wiles*, 58 P.3d 711 (Kan. 2002). Mr. Wiles had several prior Missouri admonitions, as noted by the Missouri Supreme Court when listing four diligence violations (4-1.3), five communication violations (4-1.4), one safekeeping of client property (4-1.15(b)) violation, and one violation for conduct prejudicial to the administration of justice (4-8.4(d)). *In re Wiles*, 107 S.W.2d at 229.

Similarly, Attorney Larry Coleman received a stayed suspension and was placed on probation for a year even though he had three prior incidents of discipline when he

was found to have violated several rules of this Court, including Rule 4-1.15 for commingling client funds with his funds. *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009). Unlike *Wiles* and *Coleman*, however, Respondent does not have a repeated disciplinary history. In fact, Respondent has been disciplined once in his 18 years of practice and lacks any disciplinary history since 2004. In fact, in this case there were no client complaints against Respondent. Though Respondent's conduct in this case does not rise to the level of *Wiles* or *Coleman*, a similar disposition is appropriate because Respondent's conduct was prejudicial to the administration of justice and had the potential to cause injury to his clients.

The ABA Standards provide that after misconduct has been established, aggravating and mitigating circumstances may be considered in determining an appropriate sanction. In the present action, Informant and Respondent have considered the offenses involving the misuse of the Trust Account and his initial failure to cooperate with the investigative process and note that they could be considered aggravating factors. Respondent's lack of any recent disciplinary history, remorse and subsequent cooperation with the Office of Chief Disciplinary Counsel in the prosecution of this case could be considered mitigating factors.

Furthermore, in lieu of enforcement of the suspension, Respondent should be placed on probation for a period of one year. Improper use of a Trust Account in violation of Rule 4-1.15(a) is serious and should not be viewed lightly. However, the mitigating circumstances that exist in Respondent's case support placing Respondent on probation for one year. Specifically, Respondent lacks any recent disciplinary history,

lacked any dishonest or selfish motive and has expressed remorse for his improper use of the Trust Account. This Court found probation appropriate in both *Wiles* and *Coleman* despite those respondents' extensive disciplinary histories. Respondent's conduct did not result in any harm or potential harm to any clients. In fact, there were no client complaints filed against Respondent. Just as this Court found in *Coleman*, Respondent's conduct "needs to be monitored or limited rather than revoked". *Id*. At 87 (*citing* Section 2.7 of the ABA Standards Probation, Commentary). Based on the foregoing, probation is appropriate.

The terms of probation set forth in the DHP Decision include by way of example, but not of limitation, appointment of a probation monitor, quarterly reporting to the OCDC, compliance with the Rules of Professional Conduct, attendance at the Ethics School, periodic auditing of the Trust Account and maintenance of legal malpractice insurance.

Given the totality of the violations, as well as the aggravating and mitigating circumstances, Informant concurs in the discipline recommended by the Panel and submits that the evidence, Missouri case law and the ABA Standards support such a disposition.

CONCLUSION

Respondent commingled his funds with the funds in the Trust Account in violation of Rule 4-1.15(a). In addition, Respondent deposited client funds into the Operating Account in advance of those fees being earned in violation of Rule 4-1.15(a). In addition, Respondent used the Trust Account to pay personal expenses which resulted in the Trust Account being overdrawn. Finally, Respondent violated Rule 4-8.1(c) by failing to fully cooperate with Informant in the investigation. The limited aggravating circumstances and presence of mitigating circumstances support the imposition of discipline as described herein. Informant respectfully requests that this Court indefinitely suspend Respondent from the practice of law with leave to apply for reinstatement after six months, with said suspension stayed and in lieu of enforcement thereof, place Respondent on probation for a period of one year consistent with the probationary terms set forth in the DHP Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2014, the Informant's Brief was sent through the Missouri Supreme Court e-filing system to:

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Respondent

_____
Cheryl D.S. Walker

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 8,704 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

Cheryl D.S. Walker